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In the Supreme Court of the United States

October Term, 1987

BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL SCHOOL DISTRICT, AND ITS SUPERINTENDENT, RICHARD C. MUELLER, Ph.D.,

Petitioners,

vs.

ANN NADIA TYE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. WHEN AN EMPLOYER IS FACED WITH BUDGET CUTBACKS THAT NECESSITATE A REDUCTION IN ITS WORK FORCE AND THE TERMINATION OF ONE OF TWO EQUALLY QUALIFIED EMPLOYEES, BOTH OF WHOM ARE MEMBERS OF A DIFFERENT PROTECTED CLASS, CAN THE EMPLOYER'S DECISION, IF MADE BY EXERCISING MANAGEMENT DISCRETION WITHIN THE CONTEXT OF A STATE STATUTE AND A COLLECTIVE BARGAINING AGREEMENT, CONSTITUTE AN IMPERMISSIBLE REASON UPON WHICH TO BASE A FINDING OF INTENTIONAL DISCRIMINATION UNDER TITLE VII?

2. HAS A TITLE VII PLAINTIFF MET HER BURDEN OF PROOF IN A REDUCTION IN FORCE SITUATION WHEN SHE CANNOT ESTABLISH THE REPLACEMENT ELEMENT OF THE *McDONNELL DOUGLAS/BURDINE* REQUIREMENTS FOR A *PRIMA FACIE* CASE, NOR CAN SHE POINT TO DIRECT OR CIRCUMSTANTIAL EVIDENCE THAT HER TERMINATION WAS THE RESULT OF INTENTIONAL DISCRIMINATION ON THE BASIS OF SEX?

3. DOES A COURT OF APPEALS MISAPPLY THE CLEARLY ERRONEOUS STANDARD OF REVIEW, AS ARTICULATED IN *ANDERSON v. BESSEMER CITY*, WHEN IT REFUSES TO ACCEPT STIPULATED FACTS WHICH THE DISTRICT COURT FOUND TO EXPLAIN THE EMPLOYER'S LEGITIMATE, NON-DISCRIMINATORY REASONS, AND ENGAGES IN AN INDEPENDENT EXAMINATION OF THE EVIDENCE?

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BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL SCHOOL DISTRICT, AND ITS SUPERINTENDENT, RICHARD C. MUELLER, Ph.D.,

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vs.

ANN NADIA TYE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit

Petitioners, The Board of Education of the Polaris Joint Vocational School District and its Superintendent, Richard C. Mueller, Ph.D., respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit filed in these proceedings on February 13, 1987.

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit which involves important questions of first impression concerning a Title VII claimant's burdens in a reduction in force setting where both employees are equally qualified and members of different protected classes. The petition also seeks review of the circuit court's application of the clearly erroneous standard of review as delineated by this Court.

The opinion of the United States Court of Appeals for the Sixth Circuit in Case Nos. 85-3631 and 85-3941 is reported at 811 F.2d 315 and is reproduced in the Appendix at pages A1 to A14. The judgment entry filed contemporaneously with the opinion reversed an unreported decision of the district court.

The findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio, Eastern Division in Case No. C 83-4196 were delivered orally by the court on July 5, 1985. The court's judgment entry issued July 5, 1985. The Transcript of the Ruling is printed in the Appendix at pages A17 to A32.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered February 13, 1987. Petitioners filed a timely Petition for Rehearing with Suggestion for Rehearing *En Banc*. The Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on April 15, 1987. The petition is timely filed within the time period granted by the Court. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1964, Title VII, §703, 42 U.S.C. §2000e-2(a)(1):

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioner, the Board of Education of the Polaris Joint Vocational School District (herein the "Board"), is a body politic established by Title 33 of the Ohio Revised Code. In April, 1982, it was comprised of five members—three female and two male. Petitioner, Richard C. Mueller, Ph.D. (herein "Mueller"), was at all relevant times the Board's superintendent. Ann N. Tye (herein "Tye") was employed by the Board as a vocational guidance counselor from September, 1979 through June, 1982 under successive one-year limited teaching contracts. On January 1, 1982, Tye's union, the Ohio Education Association, through her bargaining unit, the Polaris Vocational Education Association, entered into a collective bargaining agreement with the Board which, among other things, controlled the non-renewal of her limited teaching contract. The collective bargaining agreement, at Article 9.2, provided that non-renewals were to be effectuated in accordance with Ohio Revised Code §3319.11.

In March, 1982, the Board announced a reduction in its general fund budget of $646,297 as a result of declining enrollment and related cutbacks in state aid. Budget cuts necessitated the reduction of staff and elimination of certain programs. In April, 1982, the Board non-renewed 25 employees pursuant to the authority of Ohio Revised Code §3319.11. Fifteen of the non-renewed employees were male; ten were female. Within the guidance department, of which Tye was a member, four positions were reduced to two—one through attrition and one through non-renewal. Tye's contract was non-renewed in April, 1982. The remaining members of the guidance department were

Martha Enold, a female, and Ernest Mason, a 49-year-old male (herein "Mason"). Tye filed her claim of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5. Tye contended that her treatment was disparate in that she was non-renewed and Mason was *retained*.

Ohio Revised Code §3319.11, the non-renewal statute which was incorporated into the collective bargaining agreement, provides that the non-renewal of a limited employment contract takes place when (a) the superintendent gives notice of intent to recommend non-renewal; (b) the superintendent recommends non-renewal; (c) the Board takes action to non-renew; and (d) the teacher is notified of non-renewal by the Board's treasurer. The state statute and collective bargaining agreement that controlled Tye's non-renewal did not require petitioners to disclose reasons for their employment action. Thus, the notice of non-renewal delivered to Tye did not contain an explanation for the employment decision. That the foregoing statutory requirements were indeed satisfied, and that Tye was non-renewed according to the statute and the terms of her collective bargaining agreement, were never questioned at any time during the proceedings below.

The district court held that Ohio Revised Code §3319.11 was, for purposes of Tye's Title VII sex discrimination case, superceded by federal law. Neither the district court nor the circuit court addressed the impact of the collective bargaining agreement on the employment decision.

B. District Court Proceedings

Petitioners and Tye *stipulated* to the following ten objective and subjective reasons for the employment

action and to the manner in which the employment decision was implemented:

1. The Board's statutory right to non-renew limited contracts such as Tye's;
2. The collective bargaining agreement between the parties provided for the non-renewal of Tye's contract in this manner;
3. Declining enrollment;
4. Fiscal cutbacks;
5. The need for staff with multiple certification;
6. Staff diversity and complement;
7. Employee demeanor and attitude;
8. Employee interaction with other faculty;
9. Program changes at the school; and
10. Mueller's subjective feelings and impressions exercised in his capacity of superintendent, which required him to exercise such judgment.

In the district court, Tye maintained that the operative facts of her sex discrimination claim were simply that:

1. She was more qualified than Mason;
2. She had more seniority than Mason; and
3. She had higher class of certification than Mason.

Tye testified that there were *no other factors* that tended to show discrimination against her on the basis of gender.

The qualifications of Tye and Mason were similar. The district court found both employees were equally well-qualified for the work they were doing. The district court

found that the objective criteria, such as the employees' qualifications and experience, were quite similar. The district court held that seniority was *not* an issue for determination in the Title VII action. (Prior to and during the pendency of the federal court litigation, Tye was pursuing a separate action in state court to determine her seniority rights under the collective bargaining agreement.) The district court found that Mueller had no negative feelings or impressions about Tye. Further, the district court concluded as a matter of law that it could infer no intent to discriminate against Tye on the basis of her gender.

Declining enrollment and related fiscal cutbacks necessitated the elimination of one guidance counselor position. As the district court astutely observed, *both* Tye and Mason were members of a protected class. The non-renewal of *either* guidance counselor subjected the Board to a claim of discrimination. The Board superintendent was charged with the responsibility of operating a school district in the face of severe fiscal cutbacks. To discharge his duties effectively, superintendent Mueller had to non-renew either Tye or Mason. The two employees were equally well-qualified by all objective standards. Having to obey the Ohio non-renewal statute and the collective bargaining agreement between the parties, Mueller also had to consider the remaining factors contained in the stipulations in finalizing the decision.

The district court entered judgment for petitioners on Tye's claim of sex discrimination. The trial court listened to the testimony of witnesses and also conducted its own extensive examinations. The district court reviewed exhibits and acknowledged the stipulations of the parties. The trial court concluded that Tye established a *prima facie*

case and further, that the reasons petitioners articulated for Tye's non-renewal were legitimate and non-pretextual. The trial court found no evidence whatsoever, direct or indirect, to support Tye's claim that petitioners intentionally discriminated against her on the basis of her sex.

C. Court of Appeals Proceedings

On appeal to the Sixth Circuit, Tye maintained that the district court erred as a matter of law in concluding that petitioners rebutted her *prima facie* case of sex discrimination with evidence of legitimate, non-discriminatory reasons for her non-renewal. Alternatively, Tye contended it was clearly erroneous for the district court to conclude that she had failed to show petitioners' reasons were pretextual. Petitioners argued that Tye failed to present sufficient evidence to establish a *prima facie* case, as required by the *LaGrant v. Gulf & Western Manufacturing Co.*, 748 F.2d 1087 (6th Cir. 1984) modifications to the *McDonnell Douglas/Burdine* test which apply to reduction in force cases.

LaGrant held that an ADEA plaintiff who could not prove he was replaced by a younger person in a reduction in force case must present in his *prima facie* case some "direct, circumstantial, or statistical evidence that age was a factor in his termination." *LaGrant*, 748 F.2d at 1091. The majority of the court of appeals refused to apply *LaGrant* to the present case, citing differences between sex discrimination claims under Title VII and age discrimination claims under the ADEA.

The well-reasoned dissent concurred with petitioners' position that Tye failed to establish her *prima facie* case. The dissent opined that when, due to conceded economic necessity, one of two positions is eliminated, the *McDonnell*

Douglas/Burdine elements for a *prima facie* case are not applicable because the plaintiff is not replaced. Because the plaintiff cannot prove the fourth element of replacement in a reduction in force case, *LaGrant* requires that direct or circumstantial evidence must be introduced to establish a *prima facie* case from which an inference of discrimination can be drawn. *LaGrant's* modification of the *McDonnell Douglas/Burdine* elements applies to economically necessitated reductions in a work force, and thus the dissent properly concluded that it should have been applied to the present case.

The district court accepted the stipulations as satisfying petitioners' burden to articulate legitimate, nondiscriminatory reasons for Tye's non-renewal, and concluded that no intentional discrimination on the basis of sex existed. These findings were based on the district court's appreciation of the complex circumstances confronting Mueller and on its evaluation of Mueller's testimony. The district court's ultimate finding on the issue of intent was a factual finding that could not be set aside unless it was clearly erroneous under Fed. R. Civ. P. 52.

The circuit court, however, conducted an independent examination of the evidence and testimony, and reversed the district court's finding of no intent to discriminate. The court of appeals refused to accept the stipulations as true for all purposes, thereby depriving them of the weight they deserved as evidence. The court of appeals evaluated Mueller's testimony anew, and found that it contradicted the stipulated reasons. Mueller testified that he did not articulate and record the stipulated reasons in April of 1982 because the statute and collective bargaining agreement did not require him to do so; rather, he articulated the reasons when the district court asked

him to do so in April of 1985. Such was the basis of the circuit court's finding that a contradiction existed between the stipulations and Mueller's testimony.

In addition to its improper rejection of the stipulated facts, the court of appeals also independently evaluated Mueller's testimony. While the district court's finding that his testimony was credible should have been given deference, the court of appeals characterized his testimony as "inconsistent." However, evaluations of witness credibility are strictly the province of the trial court, not the appellate court. The district court's evaluation of the evidence, which it observed first-hand, was certainly plausible. Although the court of appeals may have determined that it too had a plausible view of the evidence, it was an improper application of the clearly erroneous standard of review to reverse the district court's *equally* plausible view of the evidence.

WHY THE WRIT SHOULD BE GRANTED

1. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING WHAT NON-DISCRIMINATORY FACTORS AN EMPLOYER MAY RELY UPON, IN THE EXERCISE OF MANAGEMENT DISCRETION, WHEN THE EMPLOYER IS FORCED TO DECIDE WHICH OF TWO EQUALLY QUALIFIED EMPLOYEES TO TERMINATE, WHEN BOTH ARE MEMBERS OF A DIFFERENT PROTECTED CLASS.

When an employer must decide between two equally qualified employees, this Court has explained that Title VII does not obligate the employer to accord preference

to a candidate who is a member of a protected class over a candidate who is not a member of a protected class. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). In such circumstances, the employer has discretion to choose between the equally qualified employees, provided the criteria relied upon are not unlawful. *Id.* *Burdine* did not address a situation in which an employer must decide between two equally qualified employees, both of whom are members of a different protected class. This novel twist to the *Burdine* factual scenario presents employers with unique dilemmas, the solutions to which must be provided by this Court.

In the present case, economic necessities forced petitioners into a reduction of the work force. Absent the budget cuts, petitioners would never have had to reduce the number of positions on the staff. Business realities forced petitioners to terminate one of two equally qualified employees. *Burdine* gives petitioners the ability to exercise discretion in making that employment decision, provided that only lawful criteria are considered. Accordingly, all other considerations being equal, petitioners turned to the state statute and the collective bargaining agreement which controlled the implementation of the decision to non-renew Tye. Although petitioners' decision was non-discriminatory and justified under *Burdine*, state law, and the collective bargaining agreement, the Sixth Circuit determined that petitioners' reasons for Tye's non-renewal were pretextual.

The present case demonstrates the dilemma which the Sixth Circuit has imposed upon employers. As a non-discriminatory criterion for deciding between Mason and Tye, petitioners relied upon the Ohio Revised Code, which did not require petitioners to articulate reasons for an

employee's non-renewal. Had they disregarded the state statute, respondent would have been renewed by operation of law, and the school district would have been overstaffed and underfinanced. Petitioners also relied upon the collective bargaining agreement, which incorporated the state statute. Had they disregarded the agreement, the result would have been charges against petitioners of unfair labor practices. Had the petitioners terminated Mason, a member of the class protected against age discrimination, they would have faced an age discrimination suit. Had the petitioners terminated Tye, a member of the class protected against sex discrimination, they would have faced a sex discrimination suit. Thus, the petitioners faced a lawsuit regardless of which protected employee they non-renewed.

In these circumstances, the Sixth Circuit should have accepted petitioners' exercise of management discretion as recognized in *Burdine*, and allowed them to rely upon the non-discriminatory criteria of the state statute and the collective bargaining agreement. The Sixth Circuit's failure to recognize the petitioners' right to exercise management discretion and prerogative according to legitimate, non-discriminatory criteria will handcuff employers.[1] If

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1. Indeed, many cases have recognized that an employer's reliance on management discretion and non-discriminatory considerations is not diminished by the civil rights statutes. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria); *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987) (Title VII does not diminish lawful traditional management prerogatives in choosing among qualified candidates; if reasons are not discriminatory, employer is free to choose among qualified candidates); *Daniels v. Board of Educ. of Ravenna City School District*, 805 F.2d 203 (6th Cir. 1986) (Title VII does not obligate employer to hire minority applicant whenever that person's qualifications are equal to those of non-minority applicant);

(Continued on following page)

petitioners' reliance on the statute and the collective bargaining agreement was impermissible, thus guaranteeing a finding of discrimination regardless of which protected employee was terminated, then what *is* a permissible non-discriminatory reason upon which an employer may make an employment decision?

The size of the overall work force is increasing, and with that increase are growing numbers of women, minority, immigrant, and aging workers. Years ago, employers generally faced choices between a protected class member and a non-protected candidate, and *Burdine* spoke to that situation. Now, with increasing frequency, employers will be faced with deciding between two protected, and equally qualified, members of the work force. In the instant case, petitioners faced an age versus sex decision. In the future, sex, race, age and national origin will all be pitted against each other, in varying combinations. Employers must make daily decisions, and cannot be immobilized in the exercise of management prerogative by the fear that every employment decision may be subjected to scrutiny by the federal courts. Yet, according to the Sixth Circuit's ruling in the present case, any protected class member displeased with an adverse employment decision will prevail in a discrimination suit against the employer, even when legitimate non-discriminatory factors influenced management's exercise of its business judgment.

Whether *Burdine* applies, or whether there are other guidelines to assist an employer in choosing between two

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Footnote continued—

Wilkins v. Eaton Corp., 790 F.2d 515 (6th Cir. 1986) (factfinder may not focus on soundness of employer's business judgment); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982) (ADEA not intended as vehicle for judicial review of business decisions); *Canham v. Oberlin College*, 666 F.2d 1057 (6th Cir. 1981) (employer has discretion when choosing among candidates with different but equally desirable qualifications).

equally qualified employees who are both members of a different protected class, is an issue to which this Court should speak. The petitioners' dilemma will occur with increasing frequency, thus affecting numerous employees and employers, and therefore this Court should give definitive guidance on this important question.

2. THIS CASE PRESENTS AN IMPORTANT QUESTION, IN THE CONTEXT OF AN ECONOMICALLY NECESSITATED REDUCTION IN THE WORK FORCE, AS TO WHETHER A PLAINTIFF WHO WAS TERMINATED AND NOT REPLACED BY ANOTHER EMPLOYEE, AND WHO LACKS DIRECT OR CIRCUMSTANTIAL EVIDENCE SUFFICIENT TO RAISE AN INFERENCE OF INTENTIONAL DISCRIMINATION, CAN MEET THE BURDEN OF ESTABLISHING A PRIMA FACIE CASE.

This Court has provided ample guidance in explaining the plaintiff's burden of proof in establishing a *prima facie* case of intentional discrimination.[2] This Court has not had occasion, however, to consider what modifications to the requirements for establishing a *prima facie* case are necessary in the context of an economically necessitated reduction in work force.[3]

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2. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

3. *McDonnell Douglas* acknowledged that, just as factual situations will vary, so too will vary the proof required to establish a *prima facie* case. 411 U.S. at 802. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court emphasized that "[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general

(Continued on following page)

In the present case, respondent attempted to establish a *prima facie* case by showing (1) membership in a protected class; (2) discharge; (3) qualification for the position; and (4) replacement by a person who was not a member of the protected class. *Burdine*, 450 U.S. at 253. In *LaGrant v. Gulf & Western Mfg. Co.*,[4] the Sixth Circuit determined that such an analysis is inapplicable to the reduction in force case because the employee is not replaced and cannot prove the fourth element for a *prima facie* case. *LaGrant* demands an additional showing of direct or circumstantial evidence of an employer's intent to discriminate. Without this additional showing, the employee fails to establish a *prima facie* case because the evidence is insufficient to raise an inference of intentional discrimination. *LaGrant*, 748 F.2d at 1091.

LaGrant's modifications for establishing a *prima facie* case in a reduction in force situation are an insightful recognition of the impact that economic conditions have upon the work force. Changing economic conditions often necessitate reorganizations or reductions. Employers may have to terminate an employee who otherwise would not have been discharged, and who will not be replaced.

Footnote continued—

principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* at 358.

4. 748 F.2d 1087 (6th Cir. 1984). The facts of the instant case are strikingly similar to those in *LaGrant*. In *LaGrant*, a significant downturn in business necessitated substantial cutbacks and reductions in all departments. LaGrant's supervisor consolidated two departments, eliminated one of the department heads, and reduced from 17 to 12 the total number of employees. LaGrant was the department head who was eliminated, and a younger male was retained as head of the consolidated department. *Id.* at 1089. LaGrant sued his employer, alleging discrimination on the basis of age. *Id.* at 1088.

When economic conditions thrust such an employment decision upon an employer, it should not give rise to the same inference of discrimination which attaches when an employee is terminated and replaced under no compelling economic necessity.

In the usual scenario, a plaintiff is terminated and then replaced by another employee who is not a member of the plaintiff's protected class. If the employer seeks a similarly qualified replacement, it demonstrates a continuing need for the same services and skills that the fired employee had been providing. The combination of a female's termination and her replacement with a male gives rise to an inference of impermissible discrimination as the impetus for the employment decision. In the present case, because of the reduction in force, respondent cannot prove that she was *replaced* by a male. Tye was non-renewed because petitioners had to eliminate her position altogether. Her termination did not create a vacancy, and no male was hired to replace her. Mason simply *retained* the same job he had before the reduction in force. The combination of respondent's termination and Mason's retention cannot give rise to the same inference of intentional discrimination that would have arisen if Tye had been replaced by a male. *See, Tye*, 811 F.2d at 321-22 (Norris, J., dissenting).

LaGrant addresses the sufficiency of evidence needed to create an inference of discriminatory intent. Respondent's inability to prove that she had been replaced by a male prevented her from establishing a *prima facie* case as *Burdine* requires. Respondent's further inability to introduce direct or circumstantial evidence of discriminatory intent prevented her from curing the insufficiency in her evidence. The Sixth Circuit's failure to follow

LaGrant's modifications for reduction in force cases[5] resulted in a completely unfounded inference of discrimination arising against petitioners. Further, the Sixth Circuit's decision encourages employers faced with a reduction in force to rely upon impermissible preferences, in direct contravention of the policies underlying civil rights legislation.[6]

An economically necessitated reduction in work force is a unique situation requiring a modification of the four *McDonnell Douglas/Burdine* elements for establishing a *prima facie* case. Whether an employee who has not been replaced, and who has no direct or circumstantial evidence of discrimination, can sufficiently raise an inference of impermissible discrimination against an employer is an important question which this Court should address.

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5. The Sixth Circuit attempted to distinguish *LaGrant* from the present case on the basis that *LaGrant* involved a claim of age discrimination. *Tye*, 811 F.2d at 317 n.1. It is unlikely that *LaGrant* was intended to apply only to age discrimination cases. *LaGrant* stated that "[w]hen there is a corporate reorganization or reduction in forces, a *prima facie* case is not established when plaintiff does not show that he was replaced by a younger person. *The mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a prima facie case* of age discrimination." 748 F.2d at 1090 (emphasis added). It is apparent that the operative distinction in *LaGrant* is its application to reduction in force cases; *LaGrant* applies to claims by *all* protected classes, not just to age claims.

6. An employer reducing its work force may have to choose between two employees, both of whom possess a claim of discrimination upon termination. According to *Tye*, an astute employer concerned with avoiding potential lawsuits would be well-advised to discharge an older employee instead of a female employee. The employee with an age discrimination claim will have a more difficult time establishing a *prima facie* case as *LaGrant* requires than will a woman with a sex discrimination claim. The employee will be making the retention versus termination decision on the basis of age versus sex. Thus, the *Tye* decision encourages reliance upon preferences which the civil rights statutes specifically forbid.

3. THE COURT OF APPEALS MISAPPLIED THE CLEARLY ERRONEOUS STANDARD OF REVIEW ARTICULATED IN ANDERSON v. BESSEMER CITY AND OVERSTEPPED ITS BOUNDS BY DISREGARDING THE PARTIES' STIPULATED FACTS AND WEIGHING THE EVIDENCE ANEW.

The Sixth Circuit's decision in the present case was based upon a misapplication of the clearly erroneous standard of review articulated in Federal Rule of Civil Procedure 52(a) and this Court's decision in *Anderson v. Bessemer City.*[7] The Sixth Circuit's failure to apply and follow the proper standard for reviewing a district court's findings results in a decision that is out of line with controlling authority. A conflict exists between this Court's decision in *Bessemer City* and the Sixth Circuit's interpretation and application of that controlling precedent to the present case. Therefore, this Court should review the present case to bring uniformity among the circuits' application of the clearly erroneous standard.[8]

A district court's findings of fact may not be set aside unless they are clearly erroneous, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Issues of intent are commonly treated as factual matters for the trier of fact, and those findings are subject to the clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). The district court's finding as to whether

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7. 470 U.S. 564 (1985).

8. Petitioners acknowledge that this Court may not be disposed to grant certiorari for any of the reasons previously discussed herein. If that is so, petitioners respectfully suggest that the Sixth Circuit's misuse of the clearly erroneous standard of appellate review renders this an appropriate case for the Court to reverse summarily.

respondent's non-renewal reflected an intent to discriminate by petitioners was a purely factual question subject to the clearly erroneous standard.

The Sixth Circuit undertook a re-evaluation of the facts and testimony presented in the district court; it duplicated the role of the trial court and thereby overstepped the bounds of appropriate appellate review. *Bessemer City,* 470 U.S. at 573. At the trial court level, the parties stipulated to ten reasons for respondent's non-renewal. *Tye,* 811 F.2d at 318. Although the district court relied upon these reasons in its findings of fact (Transcript of Ruling, p. A21), the Sixth Circuit found that the stipulated reasons were in fact untrue. *Tye,* 811 F.2d at 319. Such a finding contradicts the very nature of stipulated facts.

Respondent's willingness to stipulate to the ten reasons obviated petitioners' burden of proving those reasons. A party is bound by what he stipulates. *Morelock v. N.C.R. Corp.,* 586 F.2d 1096, 1107 (6th Cir. 1978), *cert. denied,* 441 U.S. 906 (1979) (stipulation that lack of work caused layoffs precluded plaintiffs from claiming they were laid off for any other reason). Where parties stipulate to facts, both the district court and the court of appeals are bound by the record stipulated. *Unicore v. Tennessee Valley Authority,* 768 F.2d 109, 110, 112 (6th Cir. 1985). The Sixth Circuit was obligated to accept as true the ten stipulated reasons. Thus, the Sixth Circuit's delving into an independent examination of the truth or falsity of the stipulations improperly "amounted to a de novo weighing of the evidence in the record." *Bessemer City,* 470 U.S. at 573. It is the role of the trial court, *not* the appellate court, to decide factual issues de novo. *Id.* at 573.

The district court realized that the state statute did not require Mueller to articulate and/or record reasons

for Tye's non-renewal in April of 1982. Thus, it asked Mueller in April of 1985 to reconstruct his subjective and objective reasons for the non-renewal. Mueller's reconstructed subjective reasons included staff feelings, staff balance and who could perform the necessary jobs, and which employees were needed as it related to reductions in scholastic programs offered. Finally, Mueller stated that he did what he thought was best for the school district.

The Sixth Circuit rejected Mueller's testimony, deciding that his failure to make an objective Mason versus Tye comparison in April of 1982 was inconsistent with the subjective reasons Mueller did articulate in April of 1985. *Tye,* 811 F.2d at 320. The reasons Mueller *did* consider are not rendered contradictory or untrue simply because there were other possible factors which he did *not* consider. The stipulations must be accepted as true, and by their nature, cannot be inconsistent with considerations that were never subjectively made. This is so, even though there may have been factors which the Sixth Circuit would have preferred Mueller to consider, but which he did not. Thus, the Sixth Circuit improperly overstepped the scope of its appellate duties under Rule 52 when it independently examined and rejected facts already weighed and accepted by the district court.

The Sixth Circuit ignored the deference it is required to give a trial court's findings when they are based on determinations regarding witness credibility. *Bessemer City,* 470 U.S. at 574-75. The circuit court determined that Mueller's testimony was not worthy of credence. *Tye,* 811 F.2d at 320. However, the district court's determination that there was no intent to discriminate depended in large part upon its evaluation of Mueller's testimony and his credibility. "When findings are based on determina-

tions regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Bessemer City,* 470 U.S. at 575.

The Sixth Circuit impermissibly engaged in an independent re-evaluation of Mueller's testimony. *Tye,* 811 F.2d at 319 n.2. The court of appeals rejected the district court's finding of no discrimination on its own interpretation of testimony by Mueller, the very witness whose testimony, in the district court's view, supported that finding. *See, Bessemer City,* 470 U.S. at 577. Yet this is exactly the kind of evaluation which is beyond the appellate court's scope of review, and which *Bessemer City* forbids.

The district court heard the testimony of both Mueller and Tye, and the trial judge's decision to credit Mueller's testimony is entirely plausible. There were no documents or other objective evidence to discredit Mueller's testimony. Indeed, respondent herself stipulated to the petitioners' non-discriminatory reasons for her non-renewal. Even though some of the stipulated reasons may have contained elements of subjectivity, that does not automatically make a reason pretextual. "Subjectivity of evaluation is not a *per se* indicator of discrimination; . . . subjectivity, without substantial proof of racial bias *in its exercise,* does not constitute unlawful discrimination." *Grubb v. W.A. Foote Memorial Hospital,* 741 F.2d 1486, 1495-96 (6th Cir. 1984) (emphasis in original). A subjective judgment to discharge an employee can be made for any non-discriminatory reason. *Id.* at 1499. After hearing all the evidence, the district court properly determined that *none* of Mueller's reasons were discriminatory (Transcript of Ruling, at pp. A30-A31). When a trial judge's finding is based on a

decision to credit the testimony of one witness over another, and the witness' story is plausible and not contradicted by extrinsic evidence, that finding *"can virtually never be clear error."* *Bessemer City*, 470 U.S. at 575 (emphasis added).

The district court's evaluation of the evidence and its finding of no intent to discriminate were indeed plausible in light of all the evidence, and therefore could not have been clearly erroneous. Mueller's testimony was not contradicted by any extrinsic evidence. *See, Bessemer City*, 470 U.S. at 575. Respondent could introduce no direct or circumstantial evidence from which an intent to discriminate could be found or inferred. The district court found that Mueller had no negative feelings or impressions about the respondent, nor did he ever make any statements reflecting negative feelings (Transcript of Ruling, at p. A29). Even the respondent testified that no direct evidence of sex discrimination existed; there were no instances when somebody said or did anything discriminatory.

The Sixth Circuit should not have reversed the district court's findings, regardless of whether it would have weighed the evidence differently if it had been the trier of fact. *Bessemer City*, 470 U.S. at 573. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. The district court's view of the evidence, made after having the opportunity to assess all the testimony, was certainly plausible. It was error for the court of appeals to substitute *its* view of the evidence for the district court's equally permissible view. Therefore, the district court's findings were not clearly erroneous and should have been permitted to stand undisturbed.

The *Tye* decision reveals that the Sixth Circuit engaged in an independent consideration of the issue of intentional

discrimination, an exercise which *Bessemer City* clearly states is beyond the permissible scope of appellate review. This Court should review the present case to bring the circuit court's application of the clearly erroneous standard of appellate review in line with controlling authority.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed February 13, 1987)

Nos. 85-3631 & 85-3941

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN NADIA TYE,
Plaintiff-Appellant, Cross-Appellee,

v.

BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL SCHOOL DISTRICT, *et al.*,
Defendants-Appellees, Cross-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Before: MERRITT, GUY and NORRIS, *Circuit Judges.*

MERRITT, *Circuit Judge,* delivered the opinion of the court, in which GUY, *Circuit Judge,* joined. NORRIS, *Circuit Judge,* (pp. 12-14) delivered a separate dissenting opinion.

MERRITT, *Circuit Judge.* Ann Tye, plaintiff-appellant, appeals from a judgment in favor of defendant Polaris

Board of Education and other individual defendants in her Title VII sex discrimination suit. In this appeal, Ms. Tye contends that the trial court erred in law and fact by finding the defendants' proof sufficient to rebut both her *prima facie* case and her proof of pretext. The Board cross-appeals the denial of attorney's fees and restrictions placed on pre-trial discovery. For the reasons stated below, we now reverse and remand.

Ann Tye was employed by the Board of Education of the Polaris Joint Vocational School District as a vocational guidance counselor for three years from September 1979 through June 1982. Ms. Tye's employment for this period was obtained under a series of one-year limited contracts. In March, 1982, fiscal constraints forced the Board to eliminate a number of staff positions throughout the district. As part of this cutback, two of the four vocational guidance counselor positions at Ms. Tye's school were slated for elimination. One of these positions was eliminated by attrition, and the other by non-renewal of appellant's contract. One of the two surviving positions was filled by Mr. Ernest Mason, a former co-worker of the appellant. This action is based on the decision of Dr. Richard Mueller, the school superintendent, to recommend renewal of Mr. Mason's contract instead of Ms. Tye's. In this context, non-renewal of a contract is tantamount to a dismissal and constitutes an actionable employment decision under Title VII. *Ford v. Nicks,* 741 F.2d 858, 860 n.1 (6th Cir. 1984), *cert. denied,* 469 U.S. 1216 (1985).

The proper procedure for adjudication of Title VII claims is set forth by the Supreme Court cases of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). On appeal, we review factual findings

of the District Court under the "clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Precedure. *See Anderson v. City of Bessemer City,* 470 U.S. 564. *McDonnell Douglas* and *Burdine* establish a three-part structure of shifting burdens of production:

> 1. To prove a *prima facie* case, "[t]he plaintiff must prove by a proponderance [sic] of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine,* 450 U.S. at 253. One way for the plaintiff to carry this burden is to prove the elements of a hypothetical case posed in *McDonnell Douglas*: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and that the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.
>
> 2. If the plaintiff carries this burden, the defendant must then "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802.
>
> 3. If the defendant carries this burden, then the plaintiff must show that the defendant's stated reason was pretextual. 411 U.S. at 804.

The basic issue here is whether an employer may prevail when he stipulates to untrue reasons given to rebut a *prima facie* case and then refuses to give any coherent and understandable reason—subjective or objective—for an employment decision covered by Title VII.

Since it was obvious that Ms. Tye established a *prima facie* case,[1] the trial court focused solely on the defendant's reasons for the employment action. Appendix at 28. In order to meet its burden at this point the Board had to produce admissible evidence that Mr. Mason was preferred for a legitimate, non-discriminatory reason. *Burdine,* 450 U.S. at 254. The purpose of this stage of

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1. Appellees' argue that because Ms. Tye was terminated as part of a reduction in force, this circuit's decision in *LaGrant v. Gulf & Western Manufacturing Co.*, 748 F.2d 1087 (6th Cir. 1984), requires her to present additional evidence in her *prima facie* case. *LaGrant* holds that an ADEA plaintiff who cannot prove that he was replaced by a younger person in a reorganization or reduction in force, must present in his *prima facie* case some "direct, circumstantial, or statistical evidence that age was a factor in his termination." 748 F.2d at 1091. However, because of the differing factual and statutory bases presented by the two cases, it is clear that the *LaGrant* holding is inapposite to Ms. Tye's case.

As this circuit has previously noted, important differences exist between the type of discrimination actionable under Title VII and age discrimination under the ADEA:

> The progression of age is a universal human process. In the very nature of the problem, it is apparent in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex, and national origin.

Laugesen v. Anaconda Co., 510 F.2d 307, 313 n.4 (6th Cir. 1975). Because of these differences, cases interpreting the procedural framework under one statute are not automatically applicable to the other. *See LaGrant v. Gulf & Western Manufacturing Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984) (citing cases that reject strict application of *McDonnell Douglas* to ADEA claims).

Furthermore, when the *LaGrant* opinion is examined closely, it is apparent that it is factually inapposite as well. The plaintiff in *LaGrant* failed to prove an essential element of his *prima facie* case, namely that he was replaced by a younger person. 748 F.2d at 1090. In this case, Ms. Tye has conclusively established that she was replaced by a male, Mr. Ernest Mason. Thus the circumstances that led the *LaGrant* court to add an additional element to the plaintiff's *prima facie* case are not present here.

the proceeding is two-fold: it is necessary to rebut the inference of discrimination that attaches upon proof of a *prima facie* case, and it narrows the range of explanations that the plaintiff must disprove in order to show pretext. *Burdine*, 450 U.S. at 258; *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 96-97 (6th Cir. 1982). Thus, while this burden is only one of production and not persuasion, it is elementary that the evidence produced must be clear, reasonably specific, and legally sufficient to justify a judgment for the defendant if not disproved by the plaintiff. *Burdine*, 450 U.S. at 255, 258. If the employer fails to carry this burden, the plaintiff is entitled to judgment as a matter of law. *Burdine*, 450 U.S. at 254.

If the defendant successfully articulates a legitimate reason, however, the presumption of discrimination imposed by *McDonnell Douglas* disappears. *See U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). At this stage, a Title VII trial is procedurally indistinguishable from any other civil trial. The shifting burdens have run their course, and the trial court must now turn its attention to the ultimate question of fact: Did the defendant intentionally discriminate against the plaintiff? At this last stage, sufficiency of the parties' proof as to the intermediate *McDonnell Douglas* burdens is usually no longer an issue. *Aikens*, 460 U.S. at 713-14. Yet, the trial court's decisions regarding these intermediate burdens cannot be shielded from appellate review simply because the court ignored its error and proceeded with the proof. An unrebutted *prima facie* case entitles the plaintiff to judgment as a matter of law, and a trial court's failure to grant such relief may be redressed on appeal. With this procedural framework in mind, we now turn to the issues presented by this case.

Ms. Tye contends that the reasons proferred by the Board for her non-renewal were insufficient to meet the intermediate burden described above. Reviewing the record as a whole, we find that the District Court was correct in finding the defendants' proof sufficient. To meet their burden, the defendants submitted a list of ten reasons for the decision:

1. A statutory right to non-renew limited contracts such as Ms. Tye's;

2. The collective bargaining agreement covering Ms. Tye's employment allowed for non-renewal;

3. Declining enrollment;

4. Fiscal cutbacks;

5. Multiple certification of staff;

6. Staff diversity and complement;

7. Employee demeanor and attitude;

8. Employee interaction with other faculty;

9. Program changes at the school;

10. Superintendent Richard Mueller's subjective feelings and impressions.

Appendix at 219-20.

Since the "employment decision" under review here is the choice to renew Mr. Mason instead of Ms. Tye, it is clear that reasons one through four in the list above are irrelevant. These reasons explain only why staff reductions were made, not why the plaintiff was singled out. Evidence offered to meet the intermediate burden of production must articulate a legitimate, non-discriminatory reason "why someone else was preferred." *Burdine*, 450 U.S. at 254. Since these four reasons explain only why

staff reductions were made and not why Ms. Tye was chosen to go, they are legally insufficient to rebut a *prima facie* case of discrimination in this context.

Before considering the other six reasons on the list, it is important to note that the list itself was introduced into evidence as part of a stipulation. Appendix at 216-20. Later in the trial, Dr. Richard Mueller completely contradicted all of these reasons.[2] Since Dr. Mueller had unilateral authority over recommendations for non-renewal, it is obvious from his testimony that these stipulated reasons were in fact untrue. Furthermore, Dr. Mueller's statement that he did what he thought was best for Polaris[3] is a subjective reason which is legally insufficient to rebut

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2. Dr. Mueller testified that he did not actually have a reason for recommending Ms. Tye's non-renewal in April, 1982, and that the stipulated reasons were "reconstructed" specifically for this litigation:

> Q. You are telling the Court that you have no reasons for recommending Tye's non-renewal in April of 1982?
>
> A. In April, 1982, under the Ohio Revised Code, I did not have to give reasons or make up reasons, or write them down, so I cannot testify, since I am under oath, to any reasons that existed in April of 1982, because I did not have to, *nor did I have a reason in April of 1982.*
>
> Q. So you really did not have any specific reason in mind when you recommended Tye's non-renewal?
>
> A. *That is what I testified to,* although the way up to a point in time until I was required in Federal Court to give consideration or try to reconstruct under the Ohio Revised Code, and I have given testimony of subjective reconstructed considerations that I believe that, as a human being, I gave to the best of my ability.

Appendix at 242 (cross-examination of Dr. Richard Mueller) (emphasis supplied). Dr. Mueller's subsequent testimony contradicted even these reconstructed reasons. Dr. Mueller denied any attempt to compare Ms. Tye to Mr. Mason on qualifications (Appendix at 419), personnel files (Appendix at 417), supervisor's assessments (Appendix at 407), or "subjective" factors (Appendix at 247-48).

3. Appendix at 434.

Ms. Tye's *prima facie* case. *Rowe*, 690 F.2d at 96-97. Therefore, if the stipulations had not been introduced and Dr. Mueller's testimony alone had been used to meet the defendant's intermediate burden, Ms. Tye would have been entitled to judgment on an unrebutted *prima facie* case.

Since the stipulations *were* admitted into evidence, however, the *McDonnell Douglas* burdens vanished before the time Dr. Mueller testified. Chronologically, the contrary testimony could only support the plaintiff's case on pretext, and could not negate the burden of production which the defendant met previously. It is clear that *Burdine* allows the defendant to satisfy his intermediate burden by offering an untrue reason for the decision. *Burdine*, 450 U.S. at 257-58. If an untrue explanation is offered, so the reasoning goes, the plaintiff may prove pretext by attacking the employer's motive for offering an untrue reason. *Burdine*, 450 U.S. at 256. Accordingly, we find that defendants' intermediate burden was met when reasons four through nine were admitted into evidence.

A Title VII trial does not end, however, when the defendant meets his intermediate burden: the plaintiff next has an opportunity to show that the proffered reasons are a pretext for discrimination. Evidence introduced at the intermediate stage is taken on its face, while the ultimate question of intentional discrimination can only be answered by ascertaining the truth of the proffered reasons. In *Burdine*, the Supreme Court described the plaintiff's burden at this third stage of Title VII trial:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges

> with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence.*

Burdine, 450 U.S. at 256 (citation omitted) (emphasis supplied). Thus, the plaintiff may indirectly prove intentional discrimination by showing that the defendants' justifications are untrue and therefore must be a pretext. Although the District Court's finding of no pretext in Ms. Tye's case must be accorded deference as a finding of fact, it may be overturned on appeal when it is based on contradictory and evasive testimony:

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Anderson v. City of Bessemer City, 470 U.S. at 575.

Under the formulation of the "clearly erroneous" rule announced in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), the reviewing court must be left with a "definite and firm conviction that a mistake has been committed." We are so convinced in this case. The individual whose state of mind is at issue here, Dr. Richard Mueller, clearly stated that he had no specific reason for selecting Ms. Tye for non-renewal in April, 1982. Appendix at 242. He testified that he made no attempt to compare Ms. Tye to her co-workers on *any* basis prior to

selecting her for non-renewal. Appendix at 434. Dr. Mueller specifically disavowed any comparison based on qualifications (Appendix at 419), personnel files (Appendix at 417), supervisor's assessments (Appendix at 407), or "subjective" factors (Appendix at 247-48).

Appellees cite the decision of this circuit in *Grano v. Department of Development of City of Columbus,* 699 F.2d 836 (6th Cir. 1983), to support the action taken by Dr. Mueller. *Grano,* however, is distinguishable on its facts. In *Grano,* a male employee was selected for promotion over a female who had equal objective qualifications. The employer, who was familiar with the plaintiff's work, did not interview her and based his decision solely on his subjective assessment of her qualifications. In the instant case, Dr. Mueller was not Ms. Tye's immediate supervisor and did not have the personal knowledge possessed by the decisionmaker in *Grano.* Here, the defendant could have obtained this information by consulting the personnel files or Ms. Tye's supervisor, Mr. Kenneth Collier. He chose to do neither. Subjective reasons are sufficient if they result from investigation into the employee's character and performance, but preferences cannot be sufficient if they simply emanate from the subconscious of the decisionmaker without any specific basis.

The District Court found that Dr. Mueller non-renewed Ms. Tye "without a thought process" because he was relying on a state statute[4] that allowed him to take such action without providing notice to the employee. Whatever the effect of the state statute, it is impossible for Dr. Mueller to have chosen Mason over Tye without any reason whatever. Dr. Mueller did not flip a coin or draw lots—he made a choice. The comparison may have been subcon-

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4. Ohio Rev. Code Ann. 3319.11 (1985).

scious and based on intangible factors, but it must have occurred.

Where a decisionmaker does not possess any information on which to choose between two individuals, it is well advised for him to gather information from whatever sources are available. Where no such attempt is made, and the employer gives evasive and contradictory testimony regarding the choice, he runs the risk that a Title VII plaintiff will be able to prove pretext. Ms. Tye achieved precisely that by disproving all of the defendants' proffered reasons. *Burdine*, 450 U.S. at 256. Therefore, the District Court should have entered judgment for Ms. Tye in this case.

Since we hold that Ms. Tye was indeed the victim of impermissible discrimination, it is unnecessary to consider the defendants' cross-appeal for attorney's fees. We also dismiss defendants' evidentiary claim regarding restricted discovery on the issue of Ms. Tye's motivation. The fact that a union encourages one of its members to vindicate her rights is not material where it is clear that her rights were indeed violated.

In light of the foregoing, we reverse the judgment below and remand to the District Court for such relief as may be appropriate in this case.

ALAN E. NORRIS, *Circuit Judge*, dissenting. In my view, this appeal should be resolved by reference to our opinion in *LaGrant v. Gulf & Western*, 748 F.2d 1087 (6th Cir. 1984). Analysis of and adherence to the rationale underlying that opinion leads to the inescapable conclusion that Ms. Tye did not make out a *prima facie* case.

In this case and in *LaGrant*, there was a reduction in force with the plaintiff in both having been laid off

and complaining that the decision to retain another specific employee was the product of discrimination. In each case, the plaintiff attempted to establish a *prima facie* case by showing (1) membership in the protected class, (2) discharge, (3) qualification for the position, and (4) replacement by a person who was younger or a member of the opposite sex.

In *LaGrant,* we held that this *McDonnell Douglas* four-step progression to a *prima facie* case, while appropriate in the usual termination and replacement situation where no position is eliminated and the position left open by the plaintiff's discharge is filled by another, is not applicable in a reduction in force situation since the plaintiff is not replaced. Thus, in a reduction in force situation, other evidence must be substituted for the fourth element (replacement) in order for there to be sufficient circumstantial evidence from which an inference of discrimination can be drawn, and a *prima facie* case made out.

The rationale of *LaGrant* is applicable here since we are confronted with a similar evidentiary consideration. The ultimate fact to be proved in discrimination cases is intentional discrimination, and direct evidence of that ultimate fact is rarely available. The evidentiary litany of *McDonnell Douglas* and its progeny recognizes the reality that proof of intentional discrimination will almost always have to depend upon circumstantial evidence. The *prima facie* case stage of the litany is a way of measuring the quality of circumstantial evidence that is required to raise an inference of intentional discrimination that is strong enough to go to a jury (*i.e.,* that would survive a motion for summary judgment or for directed verdict). *LaGrant* speaks to the sufficiency of circumstantial evi-

dence required to raise an inference of intentional discrimination, in the context of a reduction in force, as distinguished from termination and replacement.

In *LaGrant*, this court correctly perceived the evidentiary framework of reduction in forces cases. In the termination and replacement situation, when a woman is replaced by a man, that fact, in concert with a showing that (1) she was a member of the protected class, (2) was discharged, and (3) was qualified, is sufficient to ground an inference of discriminatory treatment. By contrast, when, due to conceded economic necessity, one of two positions (one held by a man, the other by a woman) is eliminated, and the male is retained and the woman is terminated, the *LaGrant* rationale says that these reduction in force circumstances do not raise an inference of intentional discrimination. The reason for the distinction is apparent; the two situations are vastly different, qualitatively. It is the replacement of a woman by a man that is the suspect circumstantial evidence; that exercise both disfavors the woman and prefers the man. By contrast, when there is a reduction in force, only the act of disfavor is present; the man simply retains the status he already had. While one might argue that retaining the man also amounts to preferential conduct, that argument was rejected in *LaGrant* to the extent that retention in concert with termination was deemed not to be circumstantial evidence of intentional discrimination, in comparison with the combination of replacement and termination, which will ground a reasonable inference of intentional discrimination, when the other *McDonnell Douglas* factors are also present.

I am unpersuaded by the distinction attempted to be drawn between this case and *LaGrant*, in footnote one

of the majority opinion, since the statement that "Ms. Tye has conclusively established that she was replaced by a male," is not an accurate characterization of the evidence as set out in the majority opinion's recitation of facts.

Accordingly, because Ms. Tye did not satisfy her burden of establishing a *prima facie* case, our inquiry should conclude at that point, and result in affirmance of the district court.

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed July 5, 1985)

Case No. C83-4196

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANN NADIA TYE,
Plaintiff,

vs.

BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL DISTRICT SUPERINTENDENT RICHARD MUELLER,
Defendants.

JUDGMENT ENTRY

The above-captioned case was tried to the Court on April 18 and 19, 1985. The plaintiff presented her case and rested, and the defendants presented their case and rested. Exhibits of the parties were admitted into evidence.

On July 5, 1985, the Court, orally, from the bench, and on the record, made its Findings of Fact and Conclusions of Law.

In accordance with those Findings of Fact and Conclusions of Law, the Court now orders that judgment be entered for the defendants. The plaintiff is to pay the costs of this action.

The parties may submit, on or before July 15, 1985, proposed additions to or changes in the Findings of Fact and Conclusions of law for the Court's consideration.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

TRANSCRIPT OF RULING OF THE UNITED STATES DISTRICT COURT

(Ruling July 5, 1985)

Civil Action No. C 83-4196

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANN TYE,
Plaintiff,

vs.

BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL SCHOOL DISTRICT, *et al.*,
Defendants.

RULING BY THE HONORABLE ALVIN I. KRENZLER
FRIDAY, JULY 5, 1985

APPEARANCES:

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[2] Friday, July 5, 1985, at 2:00 P.M.

The Court: Let me ask you this before we start. Mr. Mueller was a defendant.

Ms. Gragel: Yes, he was, your Honor.

The Court: We took him out of the trial, or is he still alive?

Ms. Gragel: He's still alive but, your Honor, he was sued in individual and official capacities.

The Court: We are here this afternoon in Civil Case Number C83-4196, Ann Tye against Board of Education of Polaris Joint Vocational School District and Mr. Mueller.

The plaintiff had filed a complaint alleging that this action arises under the provisions of the Equal Employment Opportunity Act, 42 United States Code 2000e, and the parties are the defendant, Board of Education of the Polaris Joint Vocational School District—and that the Board is an employer within the meaning of the Equal Employment Opportunity Act—and Mr. Richard Mueller here, who is Superintendent of the Polaris Joint Vocational School District and he's being sued both individually and in his official capacity, and the plaintiff, who alleges she's a citizen of the United States and for three years was employed by the Board of Education as [3]

a school guidance counsellor and was an employee under the act.

She alleges that she complied with all the procedural requirements and goes on to allege that from September, 1979, through June, 1982, she was employed by the Board of Education as a guidance counsellor under successive one-year limited teaching contracts.

In April, 1982, the defendant Mueller recommended that the Board of Education non-renew her contract of employment for the 1982-83 school year; that the Board of Education approved and accepted the recommendation and non-renewed her.

She further alleges that the defendants Mueller and the Board of Education took these actions to non-renew due to her sex, which is a violation of the Equal Employment Opportunity Act and, as a result of that, she suffered a loss of income and prays damages and other relief.

To that complaint, the amended complaint, the defendants admit certain items and deny certain ones, and, for the purpose of brevity, all of the relevant substantive allegations are, in effect, denied by the defendants.

Now, this case then came on for trial and there were some stipulations, there was some oral testimony, [4] and there were some exhibits; and we are here for the purpose of the Court making its findings of fact and conclusions of law.

What I do as a policy in these cases, I do them orally from the bench and on the record. Then I give you few days' time for the parties to submit any supplemental findings they want, and then we go from there.

Obviously, I will put a judgment on, and anybody who wants to take an appeal can.

Now, first of all, the Court finds that it has jurisdiction over the parties, over the subject matter, proper venue, and that the plaintiff has complied with all the requisite preliminaries at the EEOC and so forth.

Now, we started trial. The parties entered into stipulations and they were that plaintiff Tye is a female who was employed by the defendant Board of Education as a guidance counsellor for three years prior to her nonrenewal. Tye commenced her employment with the Board of Education for the 1979-80 academic year. Tye was employed by the defendant Board of Education as a guidance counsellor on a one-year limited contract as set forth in the Ohio Revised Code 3319.11. Ernest Mason is a male who is employed by the defendant Board of Education as a guidance counsellor commencing in the 1980-81 academic year.

[5] In March, 1982, the defendant Board of Education announced a reduction in its general fund of $647,297.00 as a result of cuts in state aid and decreased enrollment. Budget cuts caused defendant Board of Education to drop certain programs and reduce staff significantly.

Staff reduction resulted in the nonrenewal of twenty-five Board of Education teachers and guidance counsellors, fifteen of whom were male, ten of whom were female, including the plaintiff.

On April 12, 1982, the plaintiff received statutory notice of intent to nonrenew her one-year limited contract from the Board of Education Superintendent, defendant Richard C. Mueller.

On March 13, 1982, defendant Board of Education met in regular session and, upon recommendation of its superintendent, voted unanimously to nonrenew twenty-five

teachers and guidance counsellors employed under one-year—these teachers and including guidance counsellors employed under one-year limited contracts, including plaintiff's contract.

On April 14, 1982, plaintiff received a statutorily required notice that she would be nonrenewed for the 1982-83 school year from the Board of Education's treasurer.

Defendants articulated the following reason for the nonrenewal of the plaintiff's one-year limited [6] contract, as well as those of twenty-four other employees' nonrenewed limited contracts, in response to this Court's ruling that 42 U.S.C. 2000e-5 supersedes Ohio Revised Code 3319.11:

A. Its statutory right to nonrenew one-year limited contracts as set forth in ORC 3319.11;

B. Nonrenewal is expressly provided for under the terms of the applicable collective bargaining agreement which incorporates ORC 3319.11 into Section 9.2;

C. Declining enrollment;

D. Fiscal cutbacks;

E. Need for staff with multiple certifications;

F. Staff diversity and complement;

G. Staff members' demeanor and attitude;

H. Staff members' interactions with other faculty;

I. Program changes at the school; and

J. Richard C. Mueller's subjective feelings and impressions exercised in his capacity as superintendent, which requires him to exercise such judgment.

Tye filed a timely charge of sex discrimination against defendant Board of Education with the EEOC and later obtained a right to sue letter when that agency declined to take action.

Plaintiff then filed a timely suit in this Court.

[7] Now there are a few findings I want to make and also comments.

The Court finds that this is a very unusual case in that we have the plaintiff Tye who was nonrenewed and Mr. Ernest Mason was renewed.

The Counselling Department originally had four members and one member left to go to Baldwin Wallace College—and I will get into that more in precise findings —leaving three people.

It was decided to nonrenew one person and, while the evidence does not indicate that there was a conscious weighing of comparable capabilities between Miss Tye and Mr. Mason, Miss Tye was nonrenewed and Mr. Mason was renewed.

Now, we have under our law protected classes. In this case it's unusual because we have two protected classes. We have a female who is a protected class—that's Miss Tye—and we have Mr. Mason who is in a protected class because he's over forty years of age.

Therefore, it appears to this Court that we would have either a sex discrimination or an age discrimination case no matter what the Board did. In this case we are faced with a sex discrimination case.

Miss Tye is a woman, Mr. Mason is a male over forty; both are protected classes. But we are not called [8] upon to decide the issue of which one is more qual-

ified or which one has more seniority. We are dealing with a case involving sex discrimination and the only issue I have is whether Miss Tye was nonrenewed because of her sex.

While I will get into it later in the findings, I want to make certain comments and findings in regard to the collective bargaining agreement and seniority because this became an issue in the case, and I want to straighten out the relative positions between the collective bargaining agreement and the sexual discrimination charge.

There is a collective bargaining agreement that was entered into by and between the parties of the Polaris Joint Vocational School District and the Polaris Vocational Education Association on January 1, 1982, and there are several pertinent provisions in the collective bargaining agreement.

One takes place in Article 9, which is captioned, "Complaint Procedure, Nonrenewals and Termination," and 9.2 is "Nonrenewals."

It says: "The nonrenewal of limited contracts shall be governed by Section 3319.11 of the Ohio Revised Code exclusively and these terminations shall not be subject to the grievance procedure."

[9] Now, 3319.11 of the Ohio Revised Code allows nonrenewal and you don't have to give a reason, and that is what the defendants contend. So they didn't go through the normal, customary, objective standards when somebody is let go.

Attention is then called to Article 11 captioned, "Reduction in Force."

"If the Board decides to make a plan of reduction of a number of teachers, the following guidelines apply."

And 11.2 says: "Reductions thereafter will be accomplished by the nonrenewal of limited contracts with the objective of retaining teachers with greater seniority." And it goes on.

Anyway, the reduction in force situation is based on seniority.

So the agreement provides that if there is nonrenewal under 3319.11, it is not subject to the grievance procedures, but if it's a reduction in force case, the seniority list applies and it wouldn't be a nonrenewal case.

Now, this Court finds that this was, first and foremost, a reduction in force case based on the reasons stated as the cut in state funds and the reduction in enrollment and the decision to terminate twenty-five people. This was the major policy decision of the Board.

[10] After it was decided to reduce the force, the methods used are for termination, and that's up to the discretion of the Board.

Now, the Board labelled Miss Tye's termination as a nonrenewal, therefore not subject to grievance and therefore not covered by seniority. The decision to nonrenew only came after it was decided that they had to reduce the force by approximately twenty-five people.

Now, redress for that problem is in state court and isn't part of the sex discrimination case.

The reason I am getting into that is because it came up in the form of evidence and I wanted to make a distinction between the sex discrimination case and the reduction in force/seniority issue, and at the state court level and not here would be the question of whether Miss Tye was terminated because of reduction in force

or because of nonrenewal. And I find when you get your funds cut by $647,000.00 and you have a decrease in enrollment, you are going to lay off twenty-five people, it's called a reduction in force and the way you do it is nonrenew.

So we are not concerned with that in this case and that, I assume, will be another case in another court at another time. We are dealing strictly with the sex discrimination case.

Now I want to make some other comments on the [11] subject of subjective evaluations.

Because of 3319.11, Mr. Mueller believed he didn't even have to talk about it, he could just nonrenew without a thought process and that that would suffice.

This Court advised Mr. Mueller that he should go into a recess with his mind and come up with his reasons because we had to balance out the players between 3319.11, which was a state law that allows agencies like Polaris to nonrenew people for no reason whatsoever, and we have the federal law prohibiting discrimination. So I couldn't allow 3319.11 to be used in a way that would permit discrimination.

So it was our holding that the discrimination law preceded state law and we had to take a subjective look at all the evidence to see whether there was sexual discrimination.

We are not saying you cannot have a subjective evaluation, but looking at all the subjective and objective situations and conditions, if the Court would conclude that that would be sexual discrimination, then that's the way it would be.

Now, this Court further finds that the defendant, that Board of Education, is a body politic and corporate and charged with administering the affairs of the Polaris Joint Vocational School District and that it is comprised [12] of five members, and that defendant Richard Mueller has been employed by that Board of Education as Superintendent of the Polaris Joint Vocational School District since December, 1980, and the plaintiff Tye is a female who was employed by the Board as a volational guidance counsellor between September, 1979, and June, 1982. She was employed on one-year limited contracts as set forth in Ohio Revised Code 3319.11.

Now, plaintiff also received her professional counsellor's certificate on or about March, 1982, and she obtained her Bachelor of Arts degree from Kent State University in 1972, majoring in education. She received a Master of Education degree from Kent State in 1973, majoring in guidance counselling.

Plaintiff attended numerous post-graduate classes and seminars relating to education, guidance counselling, and vocational guidance counselling.

Before joining Polaris plaintiff was employed as an elementary public school teacher with different school districts for a total of three years. She was also employed as an elementary guidance counsellor for two years and as Student University Dean for one year.

Because of the fact that Miss Tye was nonrenewed and Mr. Mason was not, it is necessary to discuss Mr. Mason a little bit.

[13] He was employed as a guidance counsellor by the defendant Board of Education in September, 1980.

His additional background is that he received a Bachelor of Science degree from Ohio State University in 1964, majoring in mathematics and education. He received a Master of Education degree from Cleveland State University in 1973, majoring in administration education. He also received post-graduate training in counselling and other educational areas.

In April of 1982 Mr. Mason held a permanent teaching certificate for secondary mathematics, a four-year professional certificate as high school principal and a four-year professional certificate as counsellor and vocational counsellor in the Ohio Department of Education.

Mr. Mason received an eight-year professional certificate in counselling on April 15, 1983, and Miss Tye also received her eight-year certificate commencing, I believe, in July of 1982, which was prior to the time that Mr. Mason received his certificate.

Both of the parties are members of the Polaris Vocational Educational Association and are, therefore, part of the collective bargaining agreement that I referred to previously.

A word of comment about both Miss Tye and Mr. Mason. This Court finds that they are both exceptionally [14] well qualified for the work they are doing. They are well educated, they both had good evaluations, and this Court finds that, had it not been for the reduction in funds and also the enrollment reduction, that in all probability both of them would have been retained rather than one being nonrenewed, which is one of the unfortunate circumstances when we have budget cuts and lost or reduced enrollment.

In early 1982 the Court finds, and it's really been stipulated, that the Board and Mr. Mueller determined

that Polaris would lose $646,000 in appropriations for the 1982-83 year plus the decline in enrollment that I referred to, and defendant Mueller and Building Director Kenneth Collier determined that a reduction in force of the Polaris faculty would be required to administer the District in the face of these decreased funds and declining enrollment.

In the early part of 1982 the Guidance Counselling Department of Polaris had four counsellors. Mr. Wagner resigned to go to Baldwin Wallace in February, 1982, and was not replaced. And in March of 1982 defendant Mueller and Mr. Collier concluded that the Guidance Department would be adequately staffed by two rather than three remaining counsellors for the 1982-83 year. And they made some other reductions in other departments, and [15] the defendant Mueller decided to recommend the nonrenewal of the plaintiff as well as other personnel, including a total of twenty-five faculty members, to effect the necessary reduction in force.

On April 12, 1982, the defendant Mueller notified plaintiff Tyue that he intended to recommend a nonrenewal of her limited contract to the Board of Education, and the next day, on April 13th, Mr. Mueller went to the Board of Education with that recommendation, which was unanimously adopted without any comment or any discussion or any analysis of Miss Tye's qualifications, and she was nonrenewed.

The Board at that meeting also acted to nonrenew the limited contracts of twenty-five other teachers of which fifteen were male and ten were female.

On April 14th the plaintiff received her statutorily required notice that she would be nonrenewed from the Board of Education's treasurer.

Now, as to the reasons why Miss Tye was terminated, the defendants had a combination of objective and subjective reasons. These included the fiscal cutbacks, and there was evidence of that, program changes and declining enrollment and there was evidence of that.

In addition, the defendants had other reasons—the need for staff with multiple certifications, staff [16] diversity and complement, decorum and attitude, interaction with other faculty, and the defendant superintendent's subjective feelings and impressions—and there was some testimony on all of those criteria.

The Court finds that Mr. Mueller never compared the plaintiff and Mr. Mason head to head; in other words, he didn't compare the two of them and make a very objective analysis of who was the better employee or who was the better counsellor.

The Court finds that Mr. Mueller did not have any negative subjective feelings or impressions about plaintiff; Mr. Mueller did not state or have any objective negative feelings about Miss Tye.

The Court finds that the plaintiff performed satisfactorily and competently as a vocational guidance counsellor and there was no deficiency in her work, and the Court finds the same thing applies to Mr. Mason.

Now we come to the conclusions of law.

Congress enacted the Equal Employment Opportunity Act to provide equitable relief to persons against discrimination in employment on the basis of gender or race or origin.

To prevail in a sex discrimination action, the plaintiff must demonstrate by a preponderance of the evidence

that the employer intentionally engaged in unlawful employment practice.

[17] In these types of cases the law requires three phases. The first one is that the plaintiff must show that she was a member of a protected group and was denied employment despite being qualified and the male was hired to perform her tasks, which means she had to make a prima facie case. Then the defendant has to show the business purpose or legitimate reason for the action. And then the plaintiff comes back and shows pretext, not a legitimate business purpose.

This Court concludes that this plaintiff did establish a prima facie case for sex discrimination. She was a female, she was a member of a protected group, she was denied employment in April, 1982, despite her qualifications for the vocational guidance counsellor position, and she was replaced by Mr. Mason, a male.

Having established a prima facie showing, then Polaris and Mr. Mueller had to articulate the legitimate reasons for their action.

The defendants have articulated legitimate reasons for the nonrenewal, including but not limited to the declining enrollment, the fiscal cutbacks, and the other items mentioned, including staff with multiple certifications, diversity and complement, staff demeanor and attitude, interactions with faculty, and the program change at the school, although there were no program [18] changes in the guidance area, only a reduction in force.

This Court finds that the defendants did articulate legitimate reasons and, once the defendant articulates a nondiscriminatory reason or legitimate reason, then the plaintiff must prove that these reasons were pretextual.

And this Court concludes that these reasons were not pretextual and the Court finds that the plaintiff did not prove by a preponderance of the evidence or demonstrate that all of the defendants articulated nondiscriminatory reasons were pretextual, and the Court concludes that these defendants did not intentionally discriminate against the plaintiff on the basis of her sex, which was female.

The Court finds that there was no evidence, direct of indirect, that sex was a factor in the termination or nonrenewal of the contract; and even though some of the decisions made by Mr. Mueller were subjective reasons, and the Court frowns on subjective reasons for terminating people, but even though there is some subjective action, there must be proof of discrimination; otherwise, it does not constitute unlawful discrimination.

In this case this Court concludes there was no evidence on which to conclude there was an intentional firing, that it was because of sexual discrimination. And further, Mr. Mueller did not consider the certificates held by Miss Tye and Mr. Mason.

[19] While this Court does not approve, is not happy with the way the decision was made, I find no basis for finding it was intentionally done on the basis of sex.

So based on all of that, the Court will enter judgment in favor of the defendant Polaris and defendant Mueller both individually and on behalf of the Board for all the claims, and the costs will be paid by the plaintiff.

Mr. Linton: Thank you, your Honor. At this time the defendants would move for a motion for attorney's fees and respectfully request a later hearing on the evidentiary issues involved in that.

The Court: You can file a written motion on that.

Mr. Linton: Thank you, your Honor.

The Court: Okay? One last thing. This Court would like to say as part of its conclusion that there is no evidence that sex was a part of plaintifff's nonrenewal.

She's a member of the protected class, she was not renewed for her employment, she was especially well qualified, a male was retained who was also in a protected class, and the plaintiff didn't establish a prima facie case, the defendant established a basis that [20] was not pretextual; and for all these reasons, including the reduction in force and the lack of funds, the Court finds there was not discrimination as I said before.

You can submit some findings. If there had been enough money, we wouldn't be here.

(Court was adjourned.)

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 13, 1987)

No. 85-3631/3941

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN NADIA TYE,
Plaintiff-Appellant, Cross Appellee,

v.

BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL SCHOOL DISTRICT, *et al.*,
Defendants-Appellees, Cross Appellants.

Before: MERRITT, GUY and NORRIS, *Circuit Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: April 24, 1987 A True Copy.

Attest:

/s/ GARY MCCARTHY
Deputy Clerk

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING OR REHEARING EN BANC

(Filed April 15, 1987)

No. 85-3631/3941

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN NADIA TYE,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: MERRITT, GUY and NORRIS, *Circuit Judges*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the peti-

tion were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk